Supreme Court, U.S.
FILED

981503 MAR 19 1999

OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

FIRST FEDERAL BANK OF CALIFORNIA
Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

CONNIE SCHULTZ,
Real Party In Interest.

ON PETITION FOR REVIEW TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

STEVEN N. RICHMAN
Counsel of Record
STEVEN N. RICHMAN
LAURA E. MCSWIGGIN
EPPORT & RICHMAN
10100 Santa Monica Boulevard
Suite 1450
Los Angeles, CA 90017
(310) 785-0885
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

36pp

QUESTIONS PRESENTED

Federal law is uniformly interpreted by the Federal Circuit Courts to expressly prohibit lawsuits by employees against federal savings associations based upon implied contract claims. Federal law also expressly preempts this field. With the foregoing in mind, the questions presented by this Petition are as follows:

1. May such federal law be contradicted by California courts (and the courts of other states) to reach a contradictory (and exactly opposite) result?

2. Should the California appellate decision in *Thomka v. Financial Corp. of America* (1993) 15 Cal.App.4th 877 (which allows federal savings associations to be sued on implied contract claims) be reversed as being contrary to federal law?

3. Should a federal savings association be forced to defend a claim for breach of an implied-in-fact contract in the California courts when such a state law claim is prohibited (and preempted) on its face by federal law?

4. Should a federal savings association be forced to bear the cost and risk of a jury trial in the California court system on a state law claim which is clearly barred by federal law?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are CONNIE SCHULTZ, the Plaintiff in the underlying action and the real party in interest, and Defendant FIRST FEDERAL BANK OF CALIFORNIA, the Petitioner herein. Also parties to this litigation (but not this Petition) are Defendants FIRSTFED FINANCIAL CORP., (the parent company of FIRST FEDERAL BANK) and TERRI BAKER. There are no affiliates or subsidiaries of the Defendants, other than those which are wholly-owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. Respondent's Employment With First Federal	4
B. The Regulations	4
C. The Proceeding Below	5
REASONS FOR GRANTING THE PETITION	6
A. The Subject Federal Regulations	7
B. Preemption	7
C. OTS Regulations And The Preemption Doctrine	9
D. The California Thomka Decision	10
E. Subsequent Federal Interpretation	12
F. This Petition Involves Issues Of Significant Legal Importance	14

TABLE OF AUTHORITIES

Cases

	Page(s)
Aronson v. RTC (9th Cir. 1994) 38 F.3d 1110	11, 12, 13, 14
Bianco v. H.F. Ahmanson (C.D. Cal. 1995) 897 F.Supp. 433	13, 14
Cole v. Carteret (1988) 224 N.J. Super. 446	10, 11
Conference of Federal Sav. and Loan Assns. v. Stein (9th Cir. 1979) 604 F.2d 1256	10
Cox Broadcasting Corp. v. Cohen 420 U.S. 469, 95 S.Ct. 1029 (1975)	2
Fidelity Federal Sav. & Loan Assn. v. DeLaCuesta (1982) 458 U.S. 141	9
Fikru v. Home Savings of America (N.D. Cal. 1993) WL 204314 citing 47 Fed.Reg. at 17,471	7, 11
Fletcher v. RTC (1995 D. Kan.) 882 F. Supp. 1010	14
Florida Lime & Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132	8
Free v. Bland (1962) 369 U.S. 663	10
Hall v. Great Western Bank (1991) 231 Cal.App.3d 713	12
Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., (1985) 471 U.S. 707	7, 8
Hines v. Davidowitz (1941) 312 U.S. 52	9
Honig v. Financial Corp. of America (1992) 6 Cal.App.4th 960	12
Jones v. Rath Packing Company (1977) 430 U.S. 519	8
Logan v. San Francisco Fed. Svgs & Loan Assn. (1998 N.D. Cal.) 1998 WL 397911	14

TABLE OF AUTHORITIES

CASES

	Page(s)
Maher v. Harris Trust and Savings Bank (7th Cir. 1996) 75 F.3d 1182	5, 13
Mississippi Power & Light Co. v. Moore 484 U.S. 354, 108 S.Ct. 2428 (1988)	2
Myers v. Beverly Hills Federal Savings and Loan Association (9th Cir. 1974) 499 F.2d 1145	10
Pearce v. Downey Svgs. Assn. (1997 S.D. Cal.) 1997 WL 973457	14
Romines v. Great-West Life Assurance Co. (8th Cir. 1996) 73 F.3d 1457	5, 13
Smallwood vs. OTS (6th Cir. 1990) 925 F.2d 894	15
Thomka v. Financial Corp. of America (1993) 15 Cal.App.4th 877	i, 5, 6, 10, 12

Constitution

The Supremacy Clause of the Constitution of the United States, art. VI, cl. 2	7

Statutes

12 C.F.R.	
Section 545.2	2, 5, 8
Section 563.39(a)	7, 12
Section 563.39	2, 4, 5, 7, 8
Ch. IV, Subch. D, pt 563	8
Homeowners' Loan Act of 1933	
12 U.S.C.A. 1461 *et seq.*	2
12 U.S.C. § 1464(a) (1989 Supp.)	11

TABLE OF AUTHORITIES

Appendix

	Page(s)
Reporter's Transcript for Trial Court Hearing on Motion for Summary Adjudication	a1-a7
Denial of Petition for Review by Second District of California	b1
Denial of Petition for Review by California Supreme Court	c1
12 C.F.R. 563.39, and 545.2	d1-d5

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

FIRST FEDERAL BANK OF CALIFORNIA
Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

CONNIE SCHULTZ,
Real Party In Interest.

ON PETITION FOR REVIEW TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

FIRST FEDERAL BANK OF CALIFORNIA ("FIRST FEDERAL") respectfully petitions for a Writ of Certiorari to review the Order of the California Supreme Court in this case.

OPINIONS BELOW

The denial of the Petition for Writ of Mandate/Prohibition by the California Court of Appeal (App. infra b1) is unreported. The denial of the Petition for Review by the California Supreme Court, with the comment

of Kennard, J. that the Petition should have been granted (App. infra c1), is unreported.

JURISDICTION

On February 17, 1999, the California Supreme Court denied FIRST FEDERAL'S Petition for Review, wherein FIRST FEDERAL sought to assert federal law and preempt Respondent CONNIE SCHULTZ' ("SCHULTZ") state law claim for breach of an implied-in-fact employment contract. Thus, pursuant to *Mississippi Power & Light Co. v. Moore* 484 U.S. 354, 370, 108 S.Ct. 2428, 2438 (1988) (citing to *Cox Broadcasting Corp. v. Cohen* 420 U.S. 469, 477, 95 S.Ct. 1029, 1037 (1975)), the decision as to the issue of the federal bar/preemption is final. Therefore, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a).

STATUTORY PROVISIONS INVOLVED

Sections 563.39 and 545.2 of Title 12 of the Code of Federal Regulations (the "Regulations") were promulgated pursuant to the Homeowners' Loan Act of 1933, 12 U.S.C. 1461 et. seq. (App. infra d1-d5.) Pursuant to the Regulations: (i) the Office of Thrift Supervision exclusively regulates federal savings institutions without state interference; and (ii) employees of such federal savings institutions may not have unwritten employment contracts. These Regulations have been uniformly interpreted by the Federal Circuit Courts to bar lawsuits by employees of federal savings associations based upon alleged unwritten contracts.

STATEMENT

This Petition arises out of a direct conflict between California and federal law regarding a matter of substantial federal concern. The Regulations expressly prohibit em-

ployee claims against federal savings associations based upon alleged unwritten contracts. This is done to enhance the safety and soundness of the country's banking system, which is insured by the federal government.

SCHULTZ sued FIRST FEDERAL for breach of an implied-in-fact contract. Based upon the Regulations, Petitioner FIRST FEDERAL filed a Motion for Summary Adjudication. The trial court relied upon a California court decision to deny the Motion, notwithstanding the preemption by federal law pursuant to the Regulations. The trial court recognized the conflict between California and federal law, but found itself compelled to follow California law, notwithstanding federal preemption in this area. In fact, the trial court expressly urged FIRST FEDERAL to seek appellate review (App. infra a6), stating that this "is an important issue which deserves attention" and that the conflict will exist until counsel "takes it up to the Second Appellate District and says, 'hey resolve this for us.' " (App. infra a5.)

On November 17, 1998, FIRST FEDERAL filed a Petition for Writ of Mandate/Prohibition with the Second Appellate District of the Court of Appeal for the State of California. On December 29, 1998, after almost six weeks, the California Court of Appeal denied the Petition without comment. On January 9, 1999, FIRST FEDERAL then filed a Petition for Review with the California Supreme Court. On February 17, 1999, again after six weeks, the Petition was denied (also without comment, other than the fact that one of the Justices (Kennard, J.) would have granted it).

Unless this Court intercedes, FIRST FEDERAL will be forced to bear the cost and exposure of a jury trial on a claim which is clearly barred by federal law — but which is allowed by California law (and the law of most other states).

A. Respondent's Employment With First Federal

Respondent SCHULTZ was employed by Petitioner FIRST FEDERAL as a branch manager. SCHULTZ was admittedly employed by FIRST FEDERAL without a written contract. SCHULTZ was terminated from her position on the basis that, after conducting an investigation, FIRST FEDERAL concluded that SCHULTZ had engaged in improprieties, including self-dealing and the condoning of self-dealing by subordinates; violating standard banking practices; and breaching FIRST FEDERAL'S standards of conduct.

In response to her termination, SCHULTZ sued FIRST FEDERAL for breach of an implied-in-fact contract (among other claims). SCHULTZ does not allege the existence of a written contract. *In fact, SCHULTZ admits that she did not have a written employment contract* with FIRST FEDERAL. Instead, she claims that (i) she had an implied-in-fact employment agreement, pursuant to which she could be terminated only for cause; and (ii) the basis for her termination was insufficient to constitute such cause.

SCHULTZ' cause of action for breach of an implied-in-fact contract is barred and preempted by federal law pursuant to the Regulations. It is undisputed that the federal government regulates federal savings associations. It is equally undisputed that FIRST FEDERAL is a federal savings association. SCHULTZ, however, seeks to have a jury review the operational decisions of this federally insured institution, thereby displacing federal preemption.

B. The Regulations

The unequivocal language of 12 C.F.R. section 563.39, as promulgated by the Office of Thrift Supervision of the Department of Treasury, *bars all actions for breach of employment contracts against federal savings associations* unless the employee has a written contract, specifically

approved by the institution's board of directors. The Home Owners' Loan Act of 1933 ("HOLA") 12 U.S.C.A. 1461 *et seq.* (pursuant to which 12 C.F.R. sections 563.39 and 545.2 were promulgated), together with the United States Supreme Court and two separate Ninth Circuit decisions, have *all* held that Congress intended that the Office of Thrift Supervision should exclusively regulate federal savings institutions *without state interference.* Implicit in this statement is that such institutions should be operated without interference from juries.

The Ninth Circuit and numerous other United States District Courts have all held that, pursuant to the Regulations, alleged employment agreements which do not meet the statutory criteria (e.g., in writing and approved by the institution's directors) are *absolutely unenforceable.* The position of the Ninth Circuit has been cited with approval in dicta by both the Seventh Circuit and the Eighth Circuit.[1]

C. The Proceeding Below

FIRST FEDERAL filed a Motion for Summary Adjudication based upon the Regulations. The Motion was heard on November 6, 1998. The trial court acknowledged that California law has allowed a cause of action based on an implied-in-fact employment contract to proceed against a federal savings association (*Thomka v. Financial Corp. of America* (1993) 15 Cal.App.4th 877). The trial court, however, also recognized that there is a more recent "settled and respectable body of federal authority," including the Ninth Circuit, which bars and preempts SCHULTZ' state law claim for breach of an implied-in-fact employment contract (based upon FIRST FEDERAL'S status as a federally insured savings association). (App. infra. a3.)

---

[1] *See Maher v. Harris Trust and Savings Bank* (7th Cir. 1996) 75 F.3d 1182, and *Romines v. Great-West Life Assurance Co.* (8th Cir. 1996) 73 F.3d 1457.

Despite this well settled federal authority, the trial court still felt compelled to disregard federal law and follow the *Thomka* decision, notwithstanding the fact that *Thomka is outdated*[2].

In light of the foregoing, the trial court stated that "we are in a trending body of law and there is a good deal of speculation as to where various courts are going." (App. infra a5.) Because of this conflict between current federal law and earlier state law, the trial court urged FIRST FEDERAL to bring the matter to the Court of Appeal, stating: "I would urge counsel for the thrift to consider taking this up because it is an important issue which deserves attention." (App. infra a6.)

In response, on November 17, 1998, FIRST FEDERAL filed a Petition for Writ of Mandate/Prohibition with the California Court of Appeal requesting such review. On December 29, 1998, six weeks later, this Petition was denied. On January 9, 1999, FIRST FEDERAL then filed a Petition for Review with the California Supreme Court. On February 17, 1999, this Petition was denied (with the comment that one of the Justices was of the opinion that the Petition should have been granted).

REASONS FOR GRANTING THE PETITION

1. The Petition should be granted as there is a direct conflict between the State of California and the federal courts over both the interpretation and the preemptive effect of the Regulations. This is a matter of particular concern as it addresses federal oversight of savings associations, the deposits of which are insured by the federal government.

---

[2]The *Thomka* decision was rendered *prior* to the federal courts' interpretation of the Regulations.

2. FIRST FEDERAL is being forced to defend against a claim which is clearly prohibited by federal law. Such a claim would have been promptly dismissed had it been filed in federal court. Instead, the State of California is forcing FIRST FEDERAL to expend legal fees and risk exposure on a barred claim by its allegiance to an outdated (and strained) interpretation of federal law by a California court which ignored the actual, plain language of the Regulations in favor of its opinion that the Regulations meant just the opposite of what they said.

A. The Subject Federal Regulations

Title 12 (Banks and Banking), Chapter V (Office of Thrift Supervision, Department of the Treasury), Section 563.39(a) of the Code of Federal Regulations is entitled "Employment Contracts". Section 563.39(a) provides:

> "A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. *All employment contracts shall be in writing and shall be approved specifically by an association's Board of Directors.*" (12 C.F.R., § 563.39.) (Emphasis added.)

The Office of Thrift Supervision's regulations are intended to protect the safety and soundness of the country's banking system, which is insured by the federal government. The specific purpose of the Section 563.39 regulatory scheme is to protect federally chartered savings institutions. (*Fikru v. Home Savings of America* (N.D. Cal. 1993) 1993 WL 204314 citing 47 Fed.Reg. at 17,471.)

B. Preemption

The Supremacy Clause of the Constitution of the United States, art. VI, cl. 2, invalidates all state laws that either "interfere with or are contrary to federal law." (*Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*,

(1985) 471 U.S. 707, 712.) The most direct method is for Congress to establish federal preemption by stating its intention to do so in express terms. (*Jones v. Rath Packing Company* (1977) 430 U.S. 519.)

The subject federal regulations contain this precise expression of intention: (i) 12 C.F.R. 545.2 expressly states that it is *preemptive of any state law* purporting to address the subject of "operations" of a federal savings association; and (ii) 12 C.F.R. 563.39 (the Regulation which bars claims based upon unwritten employment contracts) is found in the "operations" portion of the Regulations (12 C.F.R. Ch. IV, Subch. D, pt 563).

When preemption exists, "*state law is nullified* to the extent that it actually conflicts with federal law." (*Hillsborough, supra*, 471 U.S. 712.) (Emphasis added.) "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility," (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-43), "or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hillsborough, supra*, 471 U.S. 712.)

A conflict now exists between California and federal law. California law, which recognizes unwritten employment contracts, conflicts with federal law relating to federally insured financial institutions. As such, it stands as an *obstacle to the federal law which bars and prohibits these exact claims* and thereby renders compliance with the federal law physically impossible.

Unless the Regulations are given their preemptive effect, the State of California (and other states) will subject federally insured savings associations to a myriad of claims based upon oral, implied and otherwise unwritten contracts. It will also subject such associations to the huge costs

associated with such claims, including legal fees and the exposure associated with jury trials. California law therefore stands as an obstacle to the federal law which bars and prohibits these exact contracts and the costs/exposure associated therewith. As a result, California law prohibits compliance with federal law.

C. OTS Regulations And The Preemption Doctrine

This Court has analyzed regulations promulgated under HOLA and their preemptive effect upon state law in *Fidelity Federal Sav. & Loan Assn. v. DeLaCuesta* (1982) 458 U.S. 141 (involving the California *Wellenkamp* decision). In *DeLaCuesta*, the United States Supreme Court explained that, pursuant to HOLA, the Federal Home Loan Bank Board (the predecessor to the Office of Thrift Supervision, which was created pursuant to HOLA with broad powers to promulgate rules and regulations) had the authority to promulgate regulations governing the powers and operations of every federal savings and loan association, "from its cradle to its corporate grave." (*Fidelity Federal Sav. & Loan Assn. v. DeLaCuesta, supra*, 458 U.S. 145.)

This Court analyzed the preemption doctrine as it related to HOLA, and reiterated the well-settled doctrine that federal preemption of state law is appropriate when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*DeLaCuesta, supra*, at 153, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) This Court went on to explain that the principles of preemption do not become inapplicable merely because a matter (such as real property in the *DeLaCuesta* case) is a matter of special concern to a state. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." (*DeLaCuesta, supra*, at 153, quoting *Free*

v. Bland (1962) 369 U.S. 663, 666.) It is hard to imagine any greater interference with the "operation" of a federal savings association than a state court dictating what claims its employees may sue upon.

The preemptive effect of HOLA and the authority of the regulations promulgated thereunder were also analyzed in *Conference of Federal Sav. and Loan Assns. v. Stein* (9th Cir. 1979) 604 F.2d 1256. In *Conference of Federal Sav. and Loan Assns.*, the Ninth Circuit found that the regulatory control of the Federal Home Loan Bank Board was so pervasive as to leave no room for state regulatory control. In finding that California's Housing Financial Discrimination Act was preempted by the regulations promulgated under HOLA, the Ninth Circuit reiterated the longstanding proposition that: "Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association . . . " (*Conference of Federal Savings and Loan Associations v. Stein* (9th Cir. 1979) 604 F.2d 1260; *Myers v. Beverly Hills Federal Savings and Loan Association* (9th Cir. 1974) 499 F.2d 1145, 1147.)

D. The California Thomka Decision

Prior to the existence of any federal court guidance on the interpretation of this federal law, the Second Appellate District of California considered the Regulations in *Thomka v. Financial Corp. of America, supra*, 15 Cal.App.4th 877, and held that they did not preempt state law claims. However:

1. Due to the lack of federal interpretive law at the time, *Thomka* primarily relied on the decision of a New Jersey superior court in *Cole v. Carteret* (1988) 224 N.J. Super. 446. *Carteret* forms the entire foundation for the *Thomka* decision. However, *Carteret* was premised entirely on the unsupported proposition that the subject federal regulations

were actually intended to benefit employees. *Carteret* provided no authority for this proposition. The subject regulations themselves and federal court interpretation hold exactly to the contrary:

(a) "The purpose of the regulatory scheme is to protect federally chartered savings institutions from unsafe and unsound practices, including unsafe and unsound employment policies." *(Fikru v. Home Savings of America* (N.D.Cal. 1993) 1993 WL 204314 citing 47 Fed.Reg at 17,471.); and

(b) Section 5(a) of the Homeowners Loan Act, 12 U.S.C. § 1464(a) (1989 Supp.), provides:

> "In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such rules and regulations as the Director may prescribe (1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings banks), and (2) to issue charters therefor giving primary consideration to the best practices of thrift institutions in the United States . . ."

Carteret's position that the Board promulgated these Regulations in order to give employees express rights to sue federal associations directly contradicts their express, stated purpose to protect those associations.

2. The subsequent Ninth Circuit and the United States District Court decisions rely on the "clear and unequivocal language" of the federal regulations to both interpret the Regulations and to give them legal effect. (*Aronson v. RTC* (9th Cir. 1994) 38 F.3d 1110.) This stands in stark contrast to *Carteret's* tortured interpretation of potential, hypothetical and unstated Congressional intent, which renders the Regulations a nullity.

3. The remaining two decisions relied upon in *Thomka* were *Hall v. Great Western Bank* (1991) 231 Cal.App.3d 713 (which merely acknowledges that the federal bar was never intended to apply to tortious discharges) and *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960 (which never reached the issue on the merits, but merely reiterated the federal "well pleaded complaint" requirement and acknowledged that California courts have concurrent jurisdiction to hear federal defenses). While these cases were clearly relevant to the factual allegations in *Thomka* (wherein the employee was discharged for refusing to engage in fraud), they should be so limited and not be used to expand this theory in a manner which renders the Regulations a nullity.

E. Subsequent Federal Interpretation

The Ninth Circuit was the first federal court to review the Regulations. The Ninth Circuit found that the "clear and unequivocal language of 12 C.F.R. § 563.39(a) is dispositive." (*Aronson v. RTC* (9th Cir. 1994) 38 F.3d 1110, 1112.) *Aronson* and its progeny held that claims for unwritten employment contracts against federally insured savings associations are barred. As such, state law claims based on unwritten employment contracts are void. (*Aronson v. Revolution Trust Corporation, supra*, 38 F.3d 1112.)

In *Aronson*, the Plaintiff alleged the existence of an oral employment agreement to pay him certain retirement benefits. The Ninth Circuit analyzed the unwritten contract and held:

> "12 C.F.R. § 563.39 (1994) ('Employment Contracts') promulgates certain requirements for federally insured savings associations to enter into contracts with its officers. Section 563.39(a) provides in relevant part: '[a]ll employment contracts shall be in writing and shall be approved specifically by an association's board of direc-

tors' Id. Although no federal court has yet relied on these requirements to declare an employment contract unenforceable, *the clear and unequivocal language of 12 C.F.R. § 563.39(a) is dispositive* in the instant case . . . Aronson's oral contract with Columbia was neither in writing nor approved by Columbia's board of directors, and thus did not meet the requirements of § 563.39(a). *Pursuant to the express language of 12 C.F.R. § 563.39(a), Aronson's oral agreement is not enforceable." (Aronson v. Resolution Trust Corporation, supra,* 38 F. 3d 1112-1113.) (Emphasis added.)

The position of the Ninth Circuit has been cited with approval in dicta by both the Seventh Circuit in *Maher v. Harris Trust and Savings Bank* (7th Cir. 1996) 75 F.3d 1182, and by the Eighth Circuit in *Romines v. Great-West Life Assurance Co.* (8th Cir. 1996) 73 F.3d 1457).

Furthermore, *Bianco v. H.F. Ahmanson* (C.D. Cal. 1995) 897 F.Supp. 433, is almost identical to the case at bench. In *Bianco*, an employee of 15 years sued a federal savings and loan association for alleged breach of an implied-in-fact employment contract. She claimed that the employee handbooks, the bank's conduct, her longevity of service, her constant promotions, her constant pay raises and the bank's praise for her work created an implied employment agreement not to terminate her for any reason other than good cause. *(Bianco v. H.F. Ahmanson, supra,* 897 F. Supp. 440.) The *Bianco* Court analyzed 12 C.F.R. section 563.39(a), together with the Ninth Circuit decision in *Aronson*, and held that the alleged unwritten employment contract was unenforceable:

"*California common law* which allows for the creation of an implied in fact employment contract through conduct of the parties *conflicts with the federal regulation* requiring that all employment contracts between a savings association and its employees be in writing and approved

specifically by an association's board of director. *Accordingly, said California common law is preempted.*" (*Bianco v. H.F. Ahmanson, supra*, 97 F. Supp. at 438.) (Emphasis added.)

The holdings of numerous United States District Courts are in accord with the decisions of *Aronson* and *Bianco. (Fletcher v. RTC* (1995 D. Kan.) 882 F. Supp. 1010; *Pearce V. Downey Svgs. Assn.* (1997 S.D. Cal.) 1997 WL 973457; *Logan v. San Francisco Fed. Svgs & Loan Assn.* (1998 N.D. Cal.) 1998 WL 397911.)

F. This Petition Involves Issues Of Significant Legal Importance

As the trial court indicated, this case involves an issue of significant legal importance. Federal law expressly bars SCHULTZ' claim in its entirety, thus affording FIRST FEDERAL an absolute affirmative defense. Unfortunately, the existing California law conflicts with the Supremacy Clause of the Constitution and renders federal law a nullity.

This is not an abstract conflict between state law protecting employees and a federal law protecting nameless, faceless corporations. The federal government insures the deposits of the federal banking system, which holds public money for the public trust. As noted by Congress:

". . . [M] any S&L's became insolvent during the 1980s, placing the continued health and viability of the entire industry into question . . . [T]he failure of the S&L's forced the Federal government to spend billions of dollars because accounts at most failed S&L's were insured by the FSLIC for all amounts up to $100,000. The Report of the House Banking, Finance and Urban Affairs Committee described the urgency of the situation before it when . . . . it stated that . . . the 1980s had . . . virtually wiped out its deposit insurance fund [the FSLIC]. H.Rep. No 101-54(I), 101st Cong., 1st

Sess. 292, reprinted in 1989 U.S. Code Cong. & Admin.News 86, 88." (Emphasis added.) (*Smallwood v. OTS* (6th Cir. 1990) 925 F. 2d 894,898.)

Abrogation of federal law designed to protect federal savings associations greatly increases costs to these associations, subjecting them to greater risk of failure, the consequences of which will be borne by the federal government (not the states). Thus, by ignoring federal law, states can exact penalties from savings associations to benefit their citizens, while imposing the ultimate cost upon the federal government.

Federal law affords federally insured institutions the flexibility to operate banks and thrifts with those employees it deems most competent. Federal law preempts state law in all areas of the operation of federal savings associations. California law, however, nullifies this flexibility, instead imposing contractual entitlements and thereby dictating which employees may actually operate the associations. By doing so, the California courts are disregarding federal law and compelling FIRST FEDERAL to bear the cost and risk associated with a claim which is not allowed by federal law.

Date March 15, 1999.

Respectfully submitted,

STEVEN N. RICHMAN
EPPORT & RICHMAN
10100 Santa Monica Blvd.
Suite 1450
Los Angeles, CA 90067
(310) 785-0885
Counsel for Petitioner

APPENDIX

Appendix 1a

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Department 14 CCH Hon. Alan G. Buckner, Judge

CONNIE SCHULTZ,
Plaintiff,
vs.
FIRSTFED FINANCIAL CORPORATION, ET AL.,
Defendants.

NO. BC188215

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Friday, November 6, 1998

Appearances:

For the Plaintiff: JOSEPH POSNER, INC.
BY JOSEPH POSNER, ESQ.
16311 Ventura Boulevard
Suite 555
Encino, California 91403

For the Defendant: EPPORT & RICHMAN, LLP
BY LAURA E. MCSWIGGIN, ESQ.
10100 Santa Monica Boulevard
Suite 1450
Los Angeles, California 90067

COPY

Jill A. Stephens, CSR #9535
Official Reporter

Los Angeles, California; Friday, November 6, 1998

A.M. Session

Department 14 CCH Hon. Alan G. Buckner, Judge

Appearances

The plaintiff, Connie Schultz, represented by counsel, Joseph Posner, Inc., by Joseph Posner, Esq.; the defendant, Firstfed Financial Corporation, et al., represented by counsel, Epport & Richman, LLP, by Laura E. McSwiggin, Esq.

(Jill A. Stephens, Official Reporter.)

The Court: This is Schultz versus Firstfed, that's one word, Financial Corporation, BC188215, motion for Summary Adjudication by the defendant, moving party in the first.

Mr. Posner: Joseph Posner for plaintiff.

The Court: Always a pleasure to see you.

Mr. Posner: Thank you, Your Honor.

Ms. McSwiggin: Laura McSwiggen on behalf of defendants and moving party.

The Court: Please be seated. I think I can give this short-shift. This is the kind of case, because there's a federal body of law and state body of law, that makes it very difficult for American lawyers to explain to English lawyers or English insurance companies just exactly what the state/federal dichotomy of the United States is all about because we have, unlike the United Kingdom, two separate, independent judicial systems which, with a bow in the direction of Pennoyer versus Neff and Erie versus Tompkins is not well understood.

The problem here is that the moving party is a Federal Thrift & Loan, and there is a statute under 12 Code of Federal Regulations, Section 563.39, which over on the federal side of the equation stands for the proposition that

employment contracts involving thrifts are binding on thrifts only where the contract is, A, written and, B, approved by the association's board of directors.

Stated in the converse, oral employment contracts are not binding. Predictably then, and relying on a settled and respectable body of federal authority all based on the cited statute, the defendant takes the position that there is nowhere for the plaintiff and her counsel to go.

Mr. Posner responds, and it seems to the court rightly so, that again in a bow in the direction of the federal courts, how do you explain the fact that under cases such as Thomka, T-h-o-m-k-a, versus Financial Corporation of America, a decision of the Second Appellate District, it's as we say in the business the 2-7; that's Division 7, Second Appellate District, squarely holds to the contrary.

In the federal body of authority there's one passage in the opinion that makes clear what I think the plaintiff is saying in opposition. State court's have concurrent jurisdiction over claims arising under the regulation.

Now there is, to be sure, contrary authority, it's out of the Third Appellate District, and I'm sure you're familiar with it. It's Brooks versus Bell Savings & Loan Association which, to be sure, criticizes the Thomka cases and all of the cases on which Thomka arises, including Hall and Carteret, C-a-r-t-e-r-e-t.

But as I read auto equity sales, I am bound by a decision of the Second Appellate District. I am not bound by federal authority, because the superior court has concurrent jurisdiction with the district court. The state is not bound by the Code of Federal Regulation in question in that — in the sense that it has no ability to interpret, and must merely follow blindly the federal rule. And I think that pretty much sizes it up, doesn't it?

Ms. McSwiggin: May I be heard on the subject, Your Honor?

The Court: I would like it.

Ms. McSwiggin: I would just like to point out the California Supreme Court has held that on issues of interpretation on federal regulations, the decisions of federal courts should be given great weight. The Thomka decision was decided before there was any 9th Circuit guidance.

There was no federal guidance at that point in time, so it was made without the benefit of any federal interpretation for that statute, forcing the court on Thomka to rely on the Hall decision.

It doesn't include case charge contract claims, that was an attempt to expand the statute for wrongful discharge, and the Honig, H-O-N-I-G decision, which addressed whether or not the state court had concurrent jurisdiction, and the New Jersey Carteret decision. Since that point in time the 9th Circuit has adjudicated the decision in Aronson, which the Thomka court did not have the benefit of, and in that decision — that decision, excuse me, is consistent with federal interpretation and the United States Court's interpretation of the OTS Regulations.

We've got the conference board of Federal Savings & Loan Association which held that California Law addressing red-lining was preempted and the Fidelity Federal decision of — versus De La Questa, D-e, L-a, Q-u-e-s-t-a, which held that the Wellingcamp California decision was also preempted by this same body of law.

The Court: So you see a trend in favor of federal law?

Ms. McSwiggin: I believe that the Thomka decision was made without the benefit of federal guidance, and that we do — that guidance is now available and that the —

The Court: 9th Circuit guidance?

Ms. McSwiggin: 9th Circuit guidance.

The Court: Do you know how the United States Supreme Court feels about the 9th Circuit?

Ms. McSwiggin: But the United States Supreme Court did decide the De La Questa decision.

The Court: Because we're no longer privileged to have Professor Witkin with us, so this isn't as funny as it could have been — but somebody said, if the 9th Circuit were drowning, the Supreme Court would throw it a rock.

Ms. McSwiggin: And I believe Professor Witkin also said that with the wealth of California Law there always a decision to support any position despite the fact.

The Court: That may be true, but go and find a federal district court case that doesn't say anything that can be said about a given body of law.

It comes down to this, although I'll certainly here from Mr. Posner, my reaction to what moving counsel has said is this, very simply, and this is more a matter, I suppose, of — or at least as much a matter of philosophy as anything else. It's very simple.

Trial judges don't make law. You have an interesting issue, I give you that. We are in a trending body of law, and there's a good deal of speculation as to where various courts are going. For example, the Brooks court relied heavily on Carteret which, by the way, is a New Jersey decision.

We have our own body of law and sometimes perhaps never the twain shall meet until an intelligent lawyer like your good self takes it up to the Second Appellate District and says, "Hey, resolve this for us, sir."

Mr. Posner: Nothing to add except that I Shepardized Brooks, and I thought it was published.

The Court: I don't know that it has been. It could well be, because it's only reported there and not in California. Even if it were good law, it would be good law there, it's not good law here. It doesn't make much difference. But more power to you for having that.

The summary judgment motion will, accordingly, be denied. I would urge counsel for the Thrift to consider taking this up because it is an important issue which deserves attention. And I grant you that there are almost as many opinions as there are cases. It's quite frustrating for lawyers, I sympathize with it. Would you — is notice waived?

Mr. Posner: Notice? It's waived, sure.

The Court: Fair enough.

Ms. McSwiggin: Thank you, Your Honor.

(THE FOLLOWING PROCEEDINGS WERE CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Department 14 CCH Hon. Alan G. Buckner, Judge

CONNIE SCHULTZ,
Plaintiff,
vs.
FIRSTFED FINANCIAL CORPORATION, ET AL.,
Defendants.

NO. BC188215
REPORTER'S CERTIFICATE

State of California
County of Los Angeles

I, Jill A. Stephens, CSR No. 9535, Official Court Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 9, comprise a full, true and correct transcript of the testimony and proceedings held in the above-entitled matter on November 6, 1998.

Dated this 9th day of November, 1998.

/s/ JILL A. STEPHENS
Jill A. Stephens, C.S.R. No. 9535
Official Reporter

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 3

December 29, 1998

FIRST FEDERAL BANK OF CALIFORNIA
v.
S.C.L.A.
CONNIE SCHULTZ

B127176
Los Angeles County No. BC188215

The Court:

The petition for writ of Mandate-Prohibition is denied.

LAURA MCSWIGGIN
EPPORT & RICHMAN
10100 Santa Monica Blvd.
Suite 1450
Los Angeles, CA 90067

DIVISION 3
FIRST FEDERAL BANK OF CALIFORNIA
v.
S.C.L.A.
CONNIE SCHULTZ
B127176

c1

IN THE SUPREME COURT OF CALIFORNIA
Second Appellate District, Division Three,
No. B127176
S075837

FIRST FEDERAL BANK OF CALIFORNIA,
Petitioner
v.
LOS ANGELES COUNTY SUPERIOR COURT,
Respondent
CONNIE SCHULTZ,
Real Party In Interest

Petition for review DENIED.
Kennard, J., is of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

TEXT

12 C.F.R. § 563.39

CODE OF FEDERAL REGULATIONS
TITLE 12 — BANKS AND BANKING
CHAPTER V — OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY
PART 563 — OPERATIONS
SUBPART B — OPERATIONS AND STRUCTURE
Current through February 2, 1999; 64 FR 5148

§ 563.39 Employment contracts.

TEXT(a)

(a) General. A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

TEXT(b)

(b) Required provisions. Each employment contract shall provide that:

TEXT(b)(1)

(1) The association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

TEXT(b)(2)

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8(e)(3) or (g)(1) of Federal Deposit Insurance Act (*12 U.S.C. 1818(e)(3) and (g)(1)*) the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

TEXT(b)(3)

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the

association's affairs by an order issued under section 8(e)(4) or (g)(1) of the Federal Deposit Insurance Act (*12 U.S.C. 1818(e)(4) or (g)(1)*), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

TEXT(b)(4)

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: Provided, that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the Director or his or her designee.

TEXT(b)(5)

(5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the association.

TEXT (b)(5)(i)

(i) By the Director or his or her designee, at the time the Federal Deposit Insurance Corporation or Resolution Trust Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

TEXT (b)(5)(ii)

(ii) By the Director or his or her designee, at the time the Director or his or her designee approves a supervisory

merger to resolve problems related to operation of the association or when the association is determined by the Director to be in an unsafe or unsound condition.

TEXT

Any rights of the parties that have already vested, however, shall not be affected by such action.

General Materials (GM) — References, Annotations, or Tables

12 C.F.R. § 563.39
12 C.F.R. § 563.39
END OF DOCUMENT

Copr. (C) West 1999
No Claim to Orig. U.S. Govt. Works

TEXT

12 C.F.R. § 545.2

CODE OF FEDERAL REGULATIONS
TITLE 12 — BANKS AND BANKING
CHAPTER V — OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY
PART 545 — OPERATIONS
Current through February 2, 1999; 64 FR 5148

§ 545.2 Federal preemption.

The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

General Materials (GM) — References, Annotations, or Tables

12 C.F.R. § 545.2
12 CFR § 545.2
END OF DOCUMENT

Copr. (C) West 1999
No Claim to Orig. U.S. Govt. Works